No. 15,251

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW BING KEW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR APPELLEE.

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For the sake of convenience, the topical form used in the Brief for Appellant will be followed herein.

STATEMENT OF THE CASE.

The appellant, an alien residing in the United States, was indicted by the Grand Jury in a two count indictment. Count one charged a false claim of citizenship, 18 USC, Section 911. (T. 3.)

The government introduced in evidence an Application for Alcoholic Beverage License (T. 30) which in-

dicated that Sam Wah You (appellant), sought an Off Sale Beer and Wine License and that he was a citizen of the United States, the word "Yes" having been typed after the question, "Are you a citizen of the United States?" This application was verified.

The second count of the indictment charged a violation of Title 18 USC, Section 1001, in that appellant made a false statement or representation to an investigator of the Immigration and Naturalization Service of a material fact by telling the investigator he was a citizen of the United States of America, knowing such statement or representation to be false, etc.

The government witness, Mr. Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, testified that on or about April 14, 1953, at Stockton, California, he went to appellant's place of business, identified him, and told appellant "that I had received information that he wasn't a citizen of the United States and I was there to check with him to find out. And he said, 'I am a citizen of the United States. I was born in Sacramento, California.' And he continued to say that I could verify it myself if I wanted, I could find the record in Sacramento." (T. 43.) Mr. Anderson further testified that appellant stated he was born July 7, 1914, and gave the name of his father and mother. Appellant also stated that he had made a trip to China recently and if Mr. Anderson wanted he could check with the State Department and he would find a United States Passport had been issued to him.

Shortly thereafter Mr. Anderson left and checked the information given. Further investigation indicated that appellant was not a citizen, although he claimed to be. The evidence indicated that appellant had apparently assumed the identity of Donald H. Wahyou who had died at the age of eleven months, fifteen days on November 18, 1918. (T. 33 and Exhibit No. 3.)

ARGUMENT.

I.

THE EVIDENCE SUSTAINS THE CONVICTION OF COUNT 1.

(a) The evidence is abundantly ample to show there was a wilful violation.

Appellant contends that wilfulness is a specific element of the offense of a false claim of citizenship and cites as his chief authority *Screws v. United States,* 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 1502, but immediately digresses and cites *Black's Law Dictionary* (3d Edition), p. 1848. Turning to the language of the Court in the *Screws* case, the pertinent portion is found on page 101:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' *Spies v. United States,* 317 U. S. 492, 497. At times, as the Court held in *United States v. Murdock,* 290 U. S. 389, 394, the word denotes an act which is intentional rather that accidental. And see *United States v. Illinois Central R. Co.,* 303 U. S. 239. But 'when used in a criminal statute it generally means an act done

> with a bad purpose.' *Id.,* p. 394. And see *Felton v. United States,* 96 U. S. 699; *Potter v. United States,* 155 U. S. 438; *Spurr v. United States,* 174 U. S. 728; *Hargrove v. United States,* 67 F. 2d 820. In that event something more is required than the doing of the act prescribed by the statute. Cf. *United States v. Balint,* 258 U. S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. *Spurr v. United States, supra,* p. 734; *United States v. Murdock, supra,* p. 395. And that issue must be submitted to the jury under appropriate instructions. *United States v. Ragen,* 314 U. S. 513, 524."

The importance of the Court's consideration of the meaning of the word "wilful" is that the issue must be submitted to the trier of fact under appropriate instructions. In the instant case the trier of fact was the Court. Instructions, of course, are inappropriate. The Judge is presumed to know the law. We are, therefore, entitled to assume that all appropriate law was applied by the trier of fact to the various inferences that may be derived from the evidence, including that of wilfulness and that the conviction was proper. See also *Spies v. United States,* 317 U. S. 492, 500, and *United States v. Murdock,* 290 U. S. 389, 396. The singling out by appellant in his brief of the words found in the Court's ruling on the motion for judgment of acquittal that "appellant is in no position to relieve himself of criminal responsibility because of claimed ignorance; on the contrary, his brash carelessness, if such be the case, empha-

sizes his criminality'' (T. 8, Appellant's Brief, p. 13), is an attempt to seize upon words used by the Court that are not set forth as the sole reason for its decision; the words ''if such be the case'' indicate definitely that the Court believed appellant's actions to be wilful rather than due to his ''brash carelessness,'' which was the appellant's alleged defense.

Appellant's contention that the evidence is uncontradicted that the Application for Alcoholic Beverage License signed by the appellant was made without reading it and under circumstances which amounted to carelessness is far from the truth.

It must be remembered that the Court sitting as the trier of fact had before it appellant's witness Carlos W. Helton, who is appellant's supervisor of stores, testifying that he gave appellant many documents to sign (T. 100); that he had the Application for Alcoholic Beverage License prepared; that there were no scratch outs on it when he mailed it (T. 99); that with all of the various documents that he prepares and presents to appellant Helton testified appellant did not read the Application (T. 100); that the Application was for the Daylite Market in Oakley, which was a partnership (T. 100), composed of fourteen or fifteen partners. (T. 101.) The Court as the trier of fact also had before it the document in question which was Exhibit 1 (T. 30), which shows on its face that the name of the applicant was Sam Wah You and that there were no other names of partners as required on the face of the document. The Court also had before it on the face of the same docu-

ment the notarized signature of appellant to the statement that "I have read the foregoing application and know the contents thereof and each and all of the statements therein made are true; (3) that no person other than the applicant or applicants has any direct or indirect interest in the applicant's or applicants' business to be conducted under the license(s) for which this application is made." In addition to the documents which in many ways tend to refute Mr. Helton's phenomenal memory, if not his veracity, the Court had as evidence appellant's continued false claims of citizenship from his sworn statement of March 3, 1947, that he was born at Sacramento, California, when he obtained a passport. (T. 46, Exhibit No. 6.) Appellant testified that he was fully advised by counsel before he admitted his false claim of citizenship in a statement to Mr. Anderson in 1953 (Exhibit 7), and that after that time his attorney told him not to discuss with anybody his place of birth unless he (the attorney) were present. He further testified that he couldn't sign papers unless his attorney said yes. (T. 137.) The Court could remember that appellant testified after June, 1953, he had never told anyone he was born in Sacramento (T. 138) and he was definite that he had not. Appellant was then confronted with an application for $150,000 worth of insurance (Exhibit 9) in which it was stated appellant was born in Sacramento, California, the signature admittedly being that of applicant. A similar application for $100,000 worth of insurance containing the same allegation of birth is Exhibit 10. Appellant testified that he told the doctor the answers to certain

questions (T. 142, 143), but that he did not read the application or know anything about the allegation of birth. It is apparent that appellant is not adverse to using a false claim of citizenship if it will assist him financially.

From these few comments upon the evidence, it is obvious the trier of fact had abundant circumstances to consider with the physical and oral evidence to lead him to believe appellant's false claim of citizenship was wilful.

The issue then of wilfulness was squarely presented to the Court, who knew the law, and as the trier of fact properly applied the law and found the appellant guilty.

Apparently appellant is not raising the point that Section 911 of Title 18 USC is inapplicable to a false claim such as was made on Exhibit 1. (T. 30). In any event, the following cases are analogous to or authoritative to the propriety of the use of the Section in count one of the indictment. *Smiley v. U. S.,* 181 F. 2d 505 (9 Cir. 1950), *De Pratu v. U. S.,* 171 F. 2d 75 (9 Cir. 1948), *U. S. v. Tandaric,* 152 F. 2d 3 (7 Cir. 1945.)

II.

THE CONVICTION ON COUNT TWO SHOULD BE SUSTAINED.

(a) The statement made by appellant to investigator is within the purview of 18 USC 1001.

We now turn to the second count in the indictment and to the applicability of Section 1001 of Title 18 USC to the facts adduced at the trial.

In his official capacity as an investigator of the Immigration and Naturalization Service, Mr. Roy R. Anderson was told by the defendant (appellant) he was a citizen of the United States, born at Sacramento, California. Section 1001 makes it unlawful to knowingly make a false or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States.

There is no question but what the Immigration and Naturalization Service of the United States is a department within the meaning of the Statute and a statement made concerning citizenship to an investigator of that department which is primarily interested in matters pertaining to citizenship, is a material matter. In fact, it would be difficult to find an instance where a statement or representation by an individual would be more material to a department of the United States than is a statement concerning citizenship to the Immigration and Naturalization Service. Again, there is no question as to the misrepresentation, as appellant has admitted that he is not and never has been a citizen of the United States.

A false representation need not be in any particular form and may be oral, and it does not matter whether the government or any of its employees were deceived, the government lost anything of value, or the defendant gained anything of value by his act. *U. S. v. Meyers,* 131 F. Supp. 525, 531.

As pointed out in appellant's brief at page 17, Section 287 of the Immigration and Nationality Act of 1952, (8 U.S.C. Section 1357) provides:

> "'(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—
>
> "'(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; * * *'"

It is argued that an officer or employee of the Service has the power to interrogate only as authorized under the regulations prescribed by the Attorney General. Obviously, this is a strained and inaccurate reading of the Section. The words "authorized under regulations prescribed by the Attorney General" refer to any officer or employee of the Service as set forth in paragraph (a) of Section 1357 and not to be added after the word "interrogate" contained in subsection 1. Grammatical construction alone prevents such an interpretation.

In any event, carrying on an academic discussion concerning Section 1357 is lacking in merit since broad authority to interrogate, take an oath, take oral evi-

dence and even written evidence, if necessary, is conferred upon an Immigration Officer by Title 8 U.S.C., Section 1225 (a). The pertinent portion reads as follows:

> "* * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence."

It should be noted that this Section is entitled "Inspection by Immigration Officers—Powers of Officers."

The term "immigration officer" is defined in Section 1101 (a) (18) of Title 8 USC, as follows:

> "The term 'immigration officer' means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title."

Title 8, Code of Federal Regulations, Section 1.1 (9) states:

> "The term 'immigration officer' means:
> "(i) Any officer or employee of the Service who, on December 24, 1952, was serving under

> appointment theretofore made to the position of immigrant inspector, patrol inspector, investigator, naturalization examiner, or any other officer of the Service of a higher grade, whose appointment has not terminated, or who hereafter is appointed to such position; * * *"

Since there is no disput but that Mr. Anderson was an investigator at the time of the interrogation of appellant, he is an immigration officer having the power to interrogate any alien concerning his right to reside in the United States. The false statement to Mr. Anderson immediately tended to cut off his inquiry, since citizenship carries with it the right to remain in the United States.

The obvious reason for the defendant's false statements was to cloak himself with a mantle of citizenship and thus enable him to carry on his various successful businesses.

Defendant's sole defense was an attempt to show that he actually believed he was entitled to claim he was a citizen of the United States. In the light of his own testimony, only the most naive person could put any credence in this allegation. A few examples of defendant's testimony will indicate the absurdity of this view. To begin with, the defendant is an intelligent individual who has shown himself capable of dealing successfully in several competitive businesses. He is not a person who acted through ignorance, but is obviously a man who, through the use of money, sought to use legal machinery to circumvent the laws of this country.

When the defendant first landed in the United States at Stockton he met a person named Jung Wah You, also known as Charlie Wah You. Appellant stated he liked him very much; that he was a hundred per cent Americanized, and talked English exclusively. (T. 114.) Almost immediately they discussed citizenship, although it was unexplained how one individual speaking English, and the other speaking Chinese managed to do this. Charlie Wah You told him that he could not become a citizen because he came from China, but that he would talk to a lawyer to see if he could get him to be a citizen. From the appellant's testimony, this went on for a number of years until 1934 when Charlie Wah You wrote him that he could be a citizen for $500.00. (T. 116.) Apparently, the appellant made great to-do about wanting a paper that would show that he was legally in this country. A lawyer was contacted and the appellant "asked him through Charlie Wah You, because at that time I can't speak very good English, and part Chinese and part English" (T. 117), which, as pointed out before, was a neat trick of Charlie Wah You who couldn't speak Chinese. The upshot of this was that Charlie Wah You perjured himself by claiming the appellant as his son and that he was born in Sacramento, California. (See the Petition to the Superior Court in Exhibit "B".) After the decree establishing birth was obtained, based upon the perjury of Charlie Wah You, "the 100 per cent American," appellant claims he checked with another lawyer in Oregon by the name of William Pluhaty, and

told him that he had been adopted and asked if that was legal. It is inconceivable to me that any lawyer would advise as to the legality of this matter, or that Mr. Freitas, who obtained the order establishing birth, would make the statements attributed to him on page 121 of the Transcript of Record. Conveniently, both lawyers and Charlie Wah You are deceased and are unable to defend themselves from any allegations made by the appellant. It does appear that Mr. Freitas was paid $200.00 by the appellant for representing Charlie Wah You and that Charlie Wah You was given money by him. (T. 130.) One is left with the impression that the appellant "doeth protest too much" to be believed.

It is interesting to note appellant's reaction to a question by his attorney (T. 127), "Now, at that time did you tell him that you were a citizen of the United States?" The question was referring to the visit of Mr. Anderson in 1953. Answer: "I don't think so, definitely I say no. I told him I born in Sacramento." An extraordinary memory for exact words that might make a technical distinction with respect to this action. Contrast this with the evasiveness evidenced by the appellant concerning a vital matter to him that occurred not in 1953, but in March of this year. Of course, the question was unexpected and a convenient excuse had not been prepared. (See T. 137-138.) "Did you after July, 1953, tell anyone that you were born in Sacramento?" Answer: "No, sir." The appellant was then shown an application for insurance and two forms of statement to medical examiner. (Ex-

hibits 9, 10, and 11), in which, even after this matter was pending, appellant was still falsely claiming to be born in the United States and thus obtain insurance which he most likely would not have been granted otherwise.

It is inconceivable to me that appellant did not know what he was doing in matters involving $150,000 and $100,000.

Count two, which charges violation of Section 1001 of Title 18 USC, is a broad Statute. Precise words such as "I am a citizen of the United States" would not be necessary to fall within the Statute or the charge of the Indictment. There is testimony by Mr. Anderson that the precise words were used and the statement of the appellant that he said he was born in Sacramento. For sake of argument, if this allegation of the appellant were accepted as true, violation of Section 1001 is admitted, since birth in the United States carries with it citizenship and that is what appellant wanted all to believe.

The contention of appellant that Sections 242.11 and 242.12 of Title 8 of the Code of Federal Regulations are in any way binding upon the activities of Roy R. Anderson as an investigator for the Immigration and Naturalization Service is wasted effort. They have absolutely no applicability to the issues in this case, since we are not concerned with the various requirements apparently encountered in deportation proceedings, and, as pointed out above, could only conceivably result from the misconstruction of the language contained in Section 1357 (a) and (1) of Title

8, USC, and are, in any event, immaterial in the light of 8 USC 1225 (a). The cases such as *Bridges v. Wixon,* 326 U. S. 135, are not relevant to the issues herein and no further comment is necessary.

The cases cited by appellant such as *U. S. v. Levin,* 133 F. Supp. 88, *U. S. v. Stark, et al.,* 131 F. Supp. 190, are of no comfort to appellant. These cases are merely authority that Section 1001 of Title 18 USC is not violated by the giving of false information to a strictly investigative agency such as the Federal Bureau of Investigation which has no final disposition of most matters being investigated. The Immigration and Naturalization Service is a department of the United States which has authority to finally dispose of matters of citizenship or lack thereof which are being investigated by its officers or employees, and Section 1001 is applicable. *Cohen v. U. S.,* 201 F. 2d 386 (9 Cir.), and *Knowles v. U. S.,* 224 F. 2d 168 (10 Cir.).

(b) The sufficiency of the indictment.

> "The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. * * *" Rule 7 (c) of the Federal Rules of Criminal Procedure.

In commenting upon this Rule, Judge Denman in *Elwert v. U. S.,* 231 F. 2d 928 (9 Cir.), at page 931 says:

> "An indictment meets the requirements of the Fifth Amendment and Rule 7 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., if it

charges all the essential elements of the crime clearly enough to enable the defendant to prepare his defense and to plead the judgment in bar to a future prosecution for the same offense. *Todorow v. United States,* 9 Cir., 1949, 173 F. 2d 439, 446-447. The sufficiency of an indictment is tested by practical considerations, and defects not affecting substantial rights are disregarded."

See also *Fisher v. U. S.,* 231 F. 2d 99, (9 Cir.).

"An indictment which charges a statutory crime by following substantially the language of the statute is amply sufficient provided that its generality neither prejudices defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy, and such rule is especially applicable after verdict." *U. S. v. Franklin,* 188 F. 2d 182, 186.

See also *Smiley v. U. S.,* 9 Cir., 181 F. 2d 505; *Brown v. U. S.,* 222 F. 2d 293, 9 Cir.

Count two of the indictment in question here follows in general the language of the Statute. It is obviously sufficient to enable appellant to prepare his defense, since a Bill of Particulars was not demanded and the defense was made and it is sufficiently definite to enable appellant to plead the judgment in bar to a further prosecution for the same offense. The question of the jurisdiction of the matter within any department is a question of evidence and the mere allegation of that portion of the Statute would not affect the substantial rights of the appellant. As Judge Denman stated, "The sufficiency of an indict-

ment is tested by practical considerations * * *". The allegation in the indictment that appellant wilfully falsified "a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States, * * *" was sufficient. What appellant is seeking is in the nature of evidence and not a requisite part of an indictment.

CONCLUSION.

It is respectfully submitted that the finding of guilty on both counts of the indictment by the learned District Judge is abundantly supported by the law and the evidence and the judgment of the court below should be affirmed.

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